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In the Supreme Court
of the United States

TRACTOR TRAINING SERVICE, a corporation, TRACTOR TRAINING SERVICE, INC., a corporation, and JOY E. BADLEY,

Petitioners,

vs.

FEDERAL TRADE COMMISSION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

To the Honorable, The Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Tractor Training Service, an Oregon corporation, Tractor Training Service, Inc., an Illinois corporation, and Joy E. Badley, petitioners herein, pray that a Writ of Certiorari be issued to the United States Court of Appeals for the Ninth Circuit to review the decree of that Court entered on or about the 8th day of December, 1955, affirming an order of the Federal Trade Commission (hereinafter called "Commission") dated March 3rd, 1954, under the provisions of Sec. 5 of the Federal Trade Commission Act (15 U.S.C.A. 45).

OPINION BELOW

The Findings of Fact, Conclusion and Order of the Commission are set forth in pages 70-95 of the Transcript of Record herein. The Opinion of the Court of Appeals for the Ninth Circuit is not yet reported but appears on pages 23-32 of Appendix A herein.

JURISDICTION

The Opinion of the Court of Appeals for the Ninth Circuit was rendered on the 7th day of November, 1955, and its Decree was entered on the 8th day of December, 1955. Rehearing was denied by order entered on the 12th day of December, 1955.

Jurisdiction of the Federal Trade Commission in this cause was asserted under the provisions of the Federal Trade Commission Act, Sec. 5(b) (15 U.S.C.A. 45(b)). Jurisdiction of the Court of Appeals for the Ninth Circuit was invoked by petitioners under the provisions of Sec. 5(c) of the Federal Trade Commission Act (15 U.S.C.A. 45(c)). Jurisdiction of the United States is invoked under 28 U.S.C.A. 1254(1), and Sec. 5(c) of the Federal Trade Commission Act, (15 U.S.C.A., Sec. 45(c)) and Sec. 10 of Administrative Procedure Act (5 U.S.C.A. 1009).

QUESTIONS PRESENTED

1. Whether the Federal Trade Commission may, over timely and repeated objections, legally disregard the following provisions of the Administrative Procedure Act (and its own rules) on the grounds of convenience and/or economy:

(a) The provisions of Sec. 11 (5 U.S.C.A. Sec. 1010; Federal Trade Commission Rule XIV) requiring that examiners "be assigned to cases in rotation * * *."

(b) The provision of Sec. 7(a) (5 U.S.C.A. Sec. 1006(a); Federal Trade Commission Rule XV(d)), specifying the circumstances in which a substitution of hearing examiners may be made.

(c) The provisions of Secs. 5(c), 7(b) and 8(a) (5 U.S.C.A. Secs. 1004(c), 1006(b), 1007(a); Federal Trade Commission Rules XIV(8) and XXII), requiring that the initial decision in a proceeding such as herein involved shall be made by the trial examiner who heard the evidence unless he shall have become "unavailable".

STATUTORY PROVISIONS INVOLVED

No Constitutional provisions are involved in this proceeding. The pertinent statutory provisions are set forth in Appendix B. Those pertaining to the jurisdiction of this Court appear on page 37. The provisions of the Federal Trade Commission Act governing appeals appear on pages 39, 40, and the pertinent provisions of the Administrative Procedure Act are set forth on pages 41-48.

STATEMENT

The facts material to the instant petition are not in dispute. They affirmatively appear in the findings, orders and decisions in the record.

This proceeding was originally instituted by the Federal Trade Commission against these petitioners (and

others) by a complaint, which complaint contained the notice that the proceedings had been assigned to J. Earl Cox, a hearing examiner of the Federal Trade Commission. The ensuing proceedings are recounted in the Opinion of the Court below as follows: "Hearings in this case were first held in Washington, D. C., starting March 10, 1952, and continuing for two days. At this hearing, Examiner J. Earl Cox presided. J. E. Badley was the only witness examined. Examiner Cox ordered a recess until April 24, 1952, at which time the hearings were resumed with Examiner Everett F. Haycroft. The substitution of examiners was promptly challenged by petitioners as a violation of requirements that examiners be assigned in rotation. In overruling the objection, the Commission gave as its reason for the substitution of Examiner Haycroft that other hearings were to be held by him in the western part of the United States, where future hearings in the instant case were scheduled, hence the substitution was in interests of economy." (Appendix A, p. 25). The substitution of hearing examiners was made by the Federal Trade Commission upon its own motion and without notice to these petitioners (T.R. p. 32). At the time the hearings were resumed before Examiner Haycraft, petitioners renewed their objections (T.R. p. 196) and on later occasions they persisted in standing on said objections. Their objections to the substitution were renewed at the close of the hearings before the trial examiner and later before the Federal Trade Commission, and on each occasion they were overruled (T.R. pp. 66, 67). In its final decision the Commission, after noting that petitioners had

declined to waive their right "to challenge the authority of the Commission to order substitution in the first instance", continued: "In circumstances such as this one, where it clearly appears that substitution will effect great savings to the Government and likely will result only in slight inconvenience and expense to the respondents, the Commission manifestly has the duty to take the steps required to effect such economy * * *. Respondents' objection to the Commission's action here are without merit * * *." (T.R. p. 67).

At the initial hearing in Washington, D. C., in addition to the oral testimony adduced, some 47 Commission exhibits together with some 14 respondents' exhibits were identified and with few exceptions received. Contrary to the statements in the Opinion of the Court below, a transcript of the Washington testimony WAS NOT, introduced at a subsequent hearing before Examiner Haycraft, and Examiner Haycraft DID NOT, hear all the testimony. The witness, Badley, was recalled as respondents' witness later but DID NOT cover "substantially the entire ground gone over in Washington, D. C." — indeed, practically none of it.

Nevertheless, Examiner Haycraft ALONE made the initial decision including the findings of fact "which in large part were adopted by the Commission" (Appendix A, p. 25) and affirmed by the Court below.

SPECIFICATIONS OF ERRORS TO BE URGED

It is respectfully submitted that the Court of Appeals in its decision in this case erred in the following particulars:

1. In affirming the Federal Trade Commission's decision that it could disregard the provisions of the Administrative Procedure Act requiring examiners to be assigned to cases in rotation and do so upon self-determined considerations of convenience or economy and over timely objections.

2. In holding that the Federal Trade Commission may, regardless of timely objection, remove a hearing examiner during the conduct of a case and substitute another in circumstances other and different than those carefully spelled out in the Administrative Procedure Act as authorizing a substitution.

3. In holding that the substitute hearing examiner could render a valid initial decision although he did NOT preside at all of the hearings and did NOT hear all of the evidence, and although the original hearing examiner was NOT "unavailable".

4. In apparently holding that petitioners' timely objections to the illegal substitution of hearing examiners, to be tenable, must be supported by allegations and proof of an evil motive on the part of the Federal Trade Commission or of bias or prejudice on the part of the substitute trial examiner.

5. In apparently holding that petitioners' timely and repeated objections to the illegal substitution of hearing examiners were nullified because the Federal Trade Commission "afforded them an opportunity to start anew".

REASONS FOR GRANTING THE WRIT

The questions decided by the Court below and presented by the instant petition are important issues of federal law with far-reaching and significant implications.

The decision of the Court of Appeals would provide judicial approval of practices that would make it legally possible for any administrative agency (1) to assign any examiner to any case, (2) to substitute examiners from time to time at pleasure, during the course of a proceeding, and (3) to select any examiner it might choose to render the initial decision.

The decision of the Court below is contrary to the clear and "mandatory" provisions of the Administrative Procedure Act; it is inconsistent with decisions of the Supreme Court interpreting that Act; and it is in conflict with decisions of other courts of appeal. The provisions and decisions with which the decision below is in irreconcilable conflict (and hereinafter cited and discussed) hold in substance as follows:

1. Provisions of the Administrative Procedure Act are mandatory and must be literally complied with.

2. "A litigant who makes a demand at the time of a hearing is entitled to an examiner chosen as the Act provides."

3. Substitutions of hearing examiners cannot be made except in the circumstances provided for in the Act.

4. An initial decision rendered by a substitute hearing examiner who presided at only part of the hearings

and heard only part of the evidence is invalid and a Commission order based thereon is a nullity.

5. It is not necessary that a litigant support his objections to the illegal substitution of hearing examiners by proving an evil motive of the Commission or bias or prejudice of the substitute trial examiner.

6. Considerations of inconvenience or added expense will not justify disregard of the provisions of the Administrative Procedure Act.

7. An illegal substitution of hearing examiners is not cured by the substitute hearing examiner giving the litigant the opportunity to start the proceeding all over again.

ARGUMENT AND CITATIONS

In a characteristically succinct statement, Mr. Justice Brandeis has recorded a basic tenet of American jurisprudence: "In the development of our liberty, insistence upon procedural regularity has been a large factor." Bordeau vs. McDowell, 256 U.S. 465 (477).

For reasons too obvious to require recitation, the preservation and "deveolpment of our liberty" is, to an unusual degree, dependent upon "procedural regularity" in the administrative field. The legislative history of the Administrative Procedure Act testifies to a clear recognition of this fact. "No more satisfactory way can be found of minimizing abuses, or fear of abuses, than by legislative statement of standards of administrative procedure to chart the course of action * * *."

> The Final Report of the Attorney General's Committee, Senate Document 8, 77th Congress, First Session, Page 215.

Congress itself, in Sec. 12 (5 U.S.C.A. 1011) of the Administrative Procedure Act, seems clearly to have declared that the procedural requirements of the Act shall be mandatory as to all agency proceedings initiated subsequent to the effective date.

The record herein admits of no dispute as to the facts upon which the three contentions here advanced are based.

1. Examiner Haycraft was not assigned to this case "in rotation as near as practicable" or "in rotation" at all. He was assigned upon the explicitly and repeatedly asserted considerations of convenience and economy.

2. The substitution of Examiner Haycraft for Examiner Cox was not made because Examiner Cox had withdrawn or was disqualified. No such contention is made.

3. Examiner Haycraft did NOT preside at ALL of the hearings and he did NOT hear ALL of the evidence. Nevertheless, he ALONE made the initial decision even though Examiner Cox was NOT "unavailable".

I.

ASSIGNMENT IN ROTATION

Sec. 11 of the Administrative Procedure Act. (5 U.S.C.A. 1010) provides the manner of appointment of hearing examiners, "who shall be assigned to cases in rotation as far as practicable * * *." This section was

considered by the Supreme Court in the following cases:

Wong Yang Sung vs. McGrath, 339 U.S. 33, 70 S. Ct. 445.

Riss & Company vs. United States, 341 U.S. 907, 71 S. Ct. 620.

U. S. vs. L. A. Tucker Truck Lines, 344 U.S. 33, 73 S. Ct. 67.

Ramspeck vs. Federal Trial Examiners Conference, 345 U.S. 128, 73 S. Ct. 570.

In the Wong Yang Sung case, this Court, after a careful review of the history of the Administrative Procedure Act, said:

> "One purpose was to introduce greater uniformity of procedure and standardization of administrative practice among the diverse agencies, whose customs had departed widely from each other. We pursue this no farther than to note that *any exception we may find it its application would tend to defeat its purpose.*" (Emphasis supplied) (U.S. p. 41; S. Ct. p. 450).

It held that the failure of the United States Commissioner of Immigation and Naturalization to accord an alien a hearing in accordance with the provisions of the Act and particularly in accordance with the provisions of Sec. 11 rendered the proceedings void.

In the Riss case, this Court in a per curiam decision citing the Wong Yang Sung case, held that in Interstate Commerce Commission proceedings must be before an examiner appointed in conformity with the provisions of Sec. 11; otherwise they are void.

These cases were discussed by this Court in the L. A. Tucker Truck Line case, wherein it was said of the Riss case:

> "That decision establishes only that a litigant in such a case as this who does make such a demand at the time of hearing is entitled to an examiner chosen as the Act provides." (U.S. p. 36; S. Ct. p. 68)

and further:

> "We hold that the defect in the examiner's appointment was an irregularity which would invalidate a resulting order if the Commission had overruled an appropriate objection made during the hearing." (U.S. p. 38; S. Ct. p. 69)

The majority decision that non-compliance with the provisions of Sec. 11 of the Administartive Procedure Act, although a fatal defect, would nevertheless be waived by failure to make a timely objection evoked vigorous dissenting opinions.

In the Ramspeck case, the Court considered for the first time the application of the provision that examiners "shall be assigned in rotation as near as practicable". It found in the majority opinion that "as far as practicable" did not preclude the classification of cases and the classification of examiners (as provided by Congressional Act) and the assignment of cases in rotation within those classifications. The limits of "permissible discretion" carefully defined in this decision preclude any possible interpretation which would sanction practically unlimited discretion. In any event the Court in the Wong Yang Sung case eliminated considerations of convenience or economy as a justification for disregarding the explicit provisions of the statute. It said (U.S. p. 46; S. Ct. p. 452):

> "Nor can we accord any weight to the argument that to apply the Administrative Procedure Act, to such

> hearings will cause inconvenience and added expense * * *. Of course it will, as it will in nearly every other agency to which it is applied, but the power of the purse belongs to Congress and Congress has determined that the price for greater fairness is not too high."

These decisions dispose of another contention, to-wit, that a litigant must show that the illegal action was prejudicial. In no case does the Supreme Court so hold, and in the L. A. Tucker Truck Lines case the Court specifically found that the appellee was not prejudiced. Mr. Justice Frankfurter in a dissenting opinion stated, "I see no reason to disagree with the Court's view that in this case non-compliance by the Interstate Commerce Commission with the requirements of the Administrative Procedure Act did not prejudice the appellee". (U.S. p. 38; S. Ct. p. 70)

II.

SUBSTITUTION OF EXAMINERS

Sec. 7(a) of the Act (5 U.S.C.A. 1006(a)) provides the occasion on which a substitution of hearing examiners may be made; specifically that he "may at any time withdraw if he deems himself disqualified"; or may be replaced "upon the filing in good faith of a timely and sufficient affidavit of personal bias or disqualification * * *." The record affirmatively shows that the original examiner, Mr. Cox, neither withdrew nor was he disqualified. The reasons for these restrictions on substitution are found in the provisions of the Act to be discussed under the next point.

III.

INITIAL DECISION

In enacting the Administrative Procedure Act, Congress in three separate sections (Secs. 5(c), 7(b) and 8(a)) laid particular and repeated emphasis on the requirement that the initial decision should be made by the hearing examiner who heard the testimony unless he he became "unavailable". The mandatory character of this provisions was known to Examiner Haycraft, because he said:

> "* * * The law requires that I shall, unless there is waiver, take all of the evidence in the case in order to render a decision." (T.R. 197)

Nevertheless, petitioners refused to waive their objection but Examiner Haycraft heard the balance of the case and alone made the initial decision.

This practice by the Federal Trade Commission of making convenient substitutions of hearing examiners did not occur for the first time in this case. It was attempted and condemned in the earlier case of Gamble-Skogmola vs. Federal Trade Commission, 211 Fed. (2d) 106. In that case, although the original hearing examiner became "legally unavailable" by reason of retirement. Nevertheless the Court held the decision by a substitute hearing examiner invalid. The Court said in connection with the provisions of the Administrative Procedure Act that the hearing examiner who hears the testimony shall alone make the decision, (page 114):

> "Here Congress apparently felt the need to directly establish the general practice and policy in the ex-

> aminer system of having recommended for initial decisions made by the trial examiner who had received the evidence, and not by some other examiner, as a means of assuring proper credibility evaluation."

Continuing on page 118, the Court said:

> "It should also be said that we are not here concerned with whether a credibility evaluation from the opportunity to see and hear the conflicting witnesses testify would or would not result in a different recommended decision on the part of the examiner. Our inquiry is directed solely to the question of procedure, not results * * *."

In two recent Court of Appeals cases the question arose as to the validity of an order based on an initial decision rendered by a hearing examiner who had not heard all the evidence.

> Kuhn vs. C. A. B., 183 F. (2d) 839 (Syl. 4).
> N. L. R. B. vs. Stoker Company, 185 F (2d) 451 (Syl. 6).

In the former of these cases the Court justified the irregularity on the grounds that the record before the Board had been stipulated by the parties; in the latter case on the ground that the original examiner had died and was therefore "unavailable". These decisions carry the clear implication that departure from the statutory procedure is not to be permitted at the uncontrolled discretion or at the pleasure or convenience of an agency but must be justified on some compelling legal grounds.

> "Exemptions from the terms of the Administrative Procedure Act are not lightly to be presumed in view of the statement in section 12 of the Act that modification must be express." (Citing authorities)

Marcello vs. Bonds, 349 U.S. 302 (310), 75 S. Ct. 757 (762).

In a recent three-judge decision, Pincket vs. U. S., 105 Fed. Sup. 67, the Court said at page 73:

"It is conceded that the examiner who conducted the hearing in the instant case was not appointed in accordance with the statute (Administrative Procedure Act) and it follows that all actions of the Commission based on his report are lacking in legal validity.

"The failure of an admisitrative agency to hold a hearing in accordance with the provisions of the Administrative Procedure Act is a defect which invalidates the whole proceedings and may not be waived."

(In a later decision, this same Court held in accordance with the L. A. Tucker Truck Lines case that the defect might be waived).

The court below recognized the legal necessity that only the examiner who heard all the evidence could render the initial decision. The learned judge who wrote the opinion of the appellate court supported his decision by certain erroneous assumptions or mininterpretations of the record. He justified the illegal practice here complained of by asserting:

"Petitioners stood on their objections to a change of examiners. A transcript of the testimony of Mr. Badley taken in Washington, D. C. was introduced at a subsequent hearing at Portland, Oregon, and at the Portland, Oregon, hearing Mr. Badley again testified covering substantially the entire ground gone over in the Washington, D. C. hearing."

"Sec. 8(a) of the Administratice Procedure Act provides that the initial decision shall be made by the

> hearing officer who presided. Examiner Haycroft made the initial decision. The fact that he did not preside over the Washington hearing in no manner changed this situation. Examiner Haycroft heard all of the evidence and from the evidence formulated the first and only decision rendered. We think this was a full compliance with the requirements of Sec. 8(a)."

The record in this cause does not support the statement that a transcript of the witness's testimony taken in Washington, D. C. was introduced at a subsequent hearing. No such transcript was introduced, and petitioners objected to taking the testimony over (T.R. p. 196). On his subsequent appearance on the witness stand, the witness was on the stand but a short time and covered very little of the ground covered in some 140 pages of his Washington testimony. During the Washington hearings, some 47 commission exhibits and 14 respondents' exhibits were identified and offered in evidence, and these were not re-offered. It cannot correctly be said that "Examiner Haycroft heard all of the evidence". (The Court even mispelled Examiner Haycraft's name.)

These provisions of the Administrative Procedure Act are in harmony with well established principles inherent in constitutional due process. This Court has condemned the practice of one examiner or official hearing the testimony and another making the order on many occasions and under many circumstances.

> "There is thus no basis for the contention that the authority conferred by Sec. 310 of the Packers and Stockyards Act is given to the Department of Agriculture, as a department in the administrative sense, so that one official may examine evidence, and

another official who has not considered the evidence may make the findings and order. In such a view, it would be possible, for example, for one official to hear the evidence and argument and arrive at certain conclusions of fact and another official who had not heard or considered either evidence or argument to overrule those conclusions and for reasons of policy to announce entirely different ones. It is no answer to say that the question for the court is whether the evidence supports the findings and the findings support the order. For the weight ascribed by the law to the findings—their conclusiveness when made within the sphere of authority conferred—rests upon the assumption that the officer who makes the findings has addressed himself to the evidence, and upon that evidence has conscientiously reached the conclusion which he deems it to justify That duty cannot be performed by one who has not considered evidence or argument. It is not an impersonal obligation. It is a duty akin to that of a judge. The one who decides must hear."

Morgan vs. U. S., 298 U.S. 468, 36 S. Ct. 906 (911).

Under the foregoing rules, it is of no avail to contend that after all Examiner Cox heard testimony for only two days. The express requirement of the statute is that the hearing examiner who writes the initial decision shall hear all of the evidence unless he shall become "unavailable". If he can miss two days of the hearing, perhaps he could miss three, or ten. If exceptions are to be allowed, where are they to stop and who can stop them? Then what becomes of the "procedural regularity" which Justice Brandeis in the quotation above found so important to our freedom?

There remains only to consider whether a litigant's legal rights to a fair and statutory hearing can be dis-

regarded and brushed aside without any recourse by the ever handy device of granting it "the opportunity to start anew", that is, granting it the boon of "ordeal by litigation" and do so over timely objection (T.R. p. 196). Obviously if an administrative agency can cure an illegal substitution of hearing examiners ONCE by so simple a method, may it not do so TWICE or THRICE, or * * * ? If the safeguards Congress attempted to create can be so easily avoided and the purposes of this legislation can be so completely disregarded, then the Administrative Procedure Act may become an empty gesture.

CONCLUSION

The record in this case establishes clear and unequivocal violations by the Federal Trade Commission of five basic provisions of the Administrative Procedure Act and of its own corresponding Rules and Regulations. The only and the explicit justification offered was "inconvenience and added expense" incident to following the provisions of the law. Not only has similar conduct been condemned by the decisions referred to herein, but the decision of the Court of Appeals in the instant case which justifies and excuses disregard of Congressional mandate upon self-determined and piously phrased considerations of convenience and economy would make it entirely possible for an administrative agency to appoint any examiner it might choose for any case, to substitute examiners not only once but perhaps several times during the course of a proceedings, and to base its decision on the findings of a hand-picked hearing examiner who might have heard little or none

of the evidence—it would, in effect, defeat the basic purposes of the Act.

As stated by this Court in the Wong Yang Sung case:

"But it would be a disservice to our form of government and to the administrative process itself if the courts should fail, so far as the terms of the Act warrant, to give effect to its remedial purposes where the evils it was aimed at appear." (U.S. p. 41; S. Ct. 450)

Respectfully submitted,

McDANNELL BROWN,
Attorney for Petitioners.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

TRACTOR TRAINING SERVICE, a corporation, TRACTOR TRAINING SERVICE, INC., a corporation, and JOY E. BADLEY, Petitioners,	)	No. 14346
vs.	)	
FEDERAL TRADE COMMISSION, Respondent.	)	

Petition to Review a Decision of the Federal Trade Commission

(Proceedings Had in the United States Court of Appeals for the Ninth Circuit)

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Excerpt from Proceedings of Tuesday, October 18, 1955

Before: HEALY, ORR and POPE, Circuit Judges.

ORDER OF SUBMISSION

ORDERED appeal herein argued by Mr. McDannell Brown, counsel for the Petitioners, and by Mr. Alan B. Hobbes, Attorney, Federal Trade Commission, counsel for the Respondent, and submitted to the Court for consideration and decision.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Excerpt from Proceedings of Monday, November 7, 1955

Before: HEALY, ORR and POPE, Circuit Judges.

ORDER DIRECTING FILING OF OPINION AND FILING AND RECORDING OF DECREE

ORDERED that the typewritten opinion this day rendered by this Court in above cause be forthwith filed by the Clerk, and that a Decree be filed and recorded in the minutes of the Court in accordance with the opinion rendered.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TRACTOR TRAINING SERVICE, a corporation, TRACTOR TRAINING SERVICE, INC., a corporation, and JOY E. BADLEY, *Petitioners,*	)	No. 14,346
v.	)	Nov. 7, 1955
FEDERAL TRADE COMMISSION, *Respondent.*	)	

Petition to review a decision of The Federal Trade Commission.

Before: HEALY, ORR and POPE, Circuit Judges.

ORR, Circuit Judge:

The Federal Trade Commission, acting pursuant to the provisions of 15 U.S.C.A. §45 (1951), conducted hearings and found that petitioners, in the course of certain sales and advertising activities, did employ false and misleading representations which constituted unfair and deceptive acts and practices in commerce contrary to the Federal Trade Commission Act, 38 Stat. 717 (1914), as amended, 15 U.S.C.A. §§41-58 (1951). A cease and desist order was issued. Petitioners seek a review. 15 U.S.C.A. §45(c).

Tractor Training Service, an Oregon corporation with headquarters in Portland, and Tractor Training Service, Inc., an Illinois corporation with Chicago headquarters, are substantially owned and controlled by Mr. Joy E. Badley. The Commission found that petitioners "are now and have for more than three years last past

engaged in the sale and distribution of a course of study and instruction consisting of forty-six lessons on the subject of diesel engines and tractor equipment . . . ." The course consists entirely of home study assignments. There is no laboratory training provided. The price for the course is $275, less certain discounts. In 1951 more than 2200 students were enrolled.

In 1948 petitioners Joy E. Badley and Tractor Training Service entered into a stipulation with the Commission which recognized that in the course of their advertising and field selling petitioners had misrepresented, in certain particulars, the benefits to be derived from their home study course. Petitioners agreed to desist from future falsifications and to refrain from making representations that companies in the diesel and tractor industries were backing or interested in petitioners' program; that graduates of the study course were in demand in the diesel industry; that the school maintained an employment service capable of procuring positions for its graduates, except so far as the school in fact provides this facility; that applicants for petitioners' program were screened to determine their qualifications for petitioners' course; that on the job training is available and that refunds could be had in the event of failure to pass examinations, finish the course, or secure employment.

In 1952 the Commission served its complaint charging petitioners with ignoring its agreement and continuing to employ misleading statements both oral and written. Hearings were held by a trial examiner and at

the conclusion thereof he made findings of fact which in large part were adopted by the Commission on appeal.

The first contention relied on by petitioners relates to an alleged violation by the Commission of the provisions of the Administrative Procedure Act, 60 Stat. 237 (1946), 5 U.S.C.A. §§1001-1011 (1946). Sec. 11 of the Act, 5 U.S.C.A. §1010, provides in part that hearing examiners "shall be assigned to cases in rotation *so far as practicable* . . ." and §8(a), 5 U.S.C.A. §1007(a), provides in part that "the officer who presided . . . shall initially decide the case . . . ."

Hearings in this case were first held in Washington, D. C., starting March 10, 1952, and continuing for two days. At this hearing Examiner J. Earl Cox presided. J. E. Badley was the only witness examined. Examiner Cox ordered a recess until April 24, 1952, at which time the hearings were resumed with Examiner Everett F. Haycroft in charge. The substitution of examiners was promptly challenged by petitioners as a violation of the requirement that examiners be assigned in rotation. In overruling the objection the Commission gave as its reason for the substitution of Examiner Haycroft that other hearings were to be held by him in the western part of the United States where future hearings in the instant case were scheduled, hence the substitution was in the interests of economy. At the resumed hearings of the case Examiner Haycroft offered to strike all testimony previously taken and begin anew or, at petitioners' option, to consider the transcript of testi-

mony theretofore taken. Petitioners stood on their objection to a change of examiners. A transcript of the testimony of Mr. Badley, taken in Washington, D. C., was introduced at a subsequent hearing in Portland, Oregon, and at the Portland, Oregon hearing Mr. Badley again testified, covering substantially the entire ground gone over in the Washington, D. C. hearing.

Section 8(a) of the Administration Procedure Act provides that the initial decision shall be made by the hearing officer who presided. Examiner Haycroft made the initial decision. The fact that he did not preside over the Washington hearings in no manner changed this situation. Examiner Haycroft heard all the evidence and from the evidence formulated the first and only decision rendered. We think this was a full compliance with the requirements of §8(a).

It is contended that the substitution of examiners violated §11, 5 U.S.C.A. §1010, which requires that hearing examiners "shall be assigned to cases in rotation so far as practicable."[1] Reliance is placed by petitioners on Wong Yang Sung v. McGrath, (1949) 339 U.S. 33; United States v. L. A. Tucker Truck Lines, (1952) 344 U.S. 33; and Ramspeck v. Federal Trial Examiner's Conference, (1953) 345 U.S. 128.

In Wong Yang Sung v. McGrath, supra, the Supreme Court determined that the administrative hearings in deportation cases must conform to the requirements of

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[1]See also, Federal Trade Commission, Rules of Practice, Rule XIV to the same effect.

the Administrative Procedure Act.[2] That case does not purport to determine the allowable scope of an administrator's discretion in assigning cases "in rotation so far as possible."

The case of United States v. Tucker Truck Lines, supra, dealt with an alleged error of the Interstate Commerce Commission in assigning a hearing examiner who had not been appointed in accordance with the requirements of §11, 5 U.S.C.A. §1010. It was held that petitioner in that case waived his objection by his failure to raise it below. The present case is distinguishable from what was said in the Tucker case in this: Examiner Haycroft is a duly appointed and qualified hearing officer. In the Tucker case the hearing officer was not.

In the Ramspeck case, supra, the Supreme Court addressed itself for the first time to the question of the scope of discretion contemplated by the phrase *"in rotation so far as practicable."* It held that the Act contemplates a modicum of discretion on the part of the agency and that the classifications which the Civil Service Commission had made were a permissible modification of the rotation rule.

We learn from the briefs that several federal agencies[3] have interpreted §11 as allowing them to deviate from mechanical rotation in the interests of economical operation. The substitution here was made early in the

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[2]Congress subsequently exempted immigration cases from §§ 5, 7 and 8 of the Administration Procedure Act, 66 Stat. 163 (1952).

[3]The Coast Guard, the Civil Aeronautics Board, the Federal Trade Commission, and the Interstate Commerce Commission, are cited as instances.

proceedings. Petitioners were afforded an opportunity to start anew. There is no suggestion of any intention on the part of the Commission to deprive petitioners of a fair hearing or that Examiner Haycroft was biased or incompetent. The change of examiners in no way prejudiced petitioners. They do not so contend but insist on a mechanical application of the statute. §10(e), 5 U.S.C.A. §1009(e).

In the course of the investigation which preceded the lodging of the complaint, agents of the Federal Trade Commission visited petitioners' offices in Chicago and Portland and requested and were granted access to corporate records. Petitioners claim that the investigators thus acquired a list of delinquent accounts which was used by the Commission to locate student witnesses to testify at the hearings. This, argues petitioners, violated their rights under the IVth Amendment to the Constitution which guarantees freedom from unreasonable search and seizure, and therefore admission of the testimony of the witnesses whose identities the Commission learned from inspection of the corporate records was error.

There are three answers to this contention. In the first place no motion was made to suppress the evidence, nor was there objection to its introduction. See Federal Trade Commission, Rules of Practice, Rule XVII(d); United States v. L. A. Tucker Truck Lines, supra, and Spiller v. Atchison, T. & S. F. Ry. Co., (1920) 253 U.S. 117, 130. Second, the record discloses that petitioners freely consented to the inspection and cooperated with

the agents. Asked whether he had supplied the agents with specimens of advertising copy, Mr. Frederick L. Innes, executive vice-president of Tractor Training Service, Inc., replied: "I have no recollection of his asking for it. If he did ask for it why, I would have supplied it, because there was nothing to hide in relation to the business or the nature of our advertising or anything else. And he thanked me for my cooperation and that is the last I ever heard of him." Finally, §9 of the Federal Trade Commission Act, 38 Stat. 722, 15 U.S.C.A. §49, provides statutory authority for Commission inspection of corporate documents such as those here involved. A reasonable demand pursuant to that authority does not violate the IVth Amendment; United States v. Morton Salt Co., (1950) 338 U.S. 632; see Wilson v. United States, (1911) 221 U.S. 361; Davis v. United States, (1946) 328 U.S. 582; Bloch v. United States, (9 Cir. 1955) ..... F.2d ..... .

Petitioners complain that the Commission heard only dissatisfied customers selected on the basis of their dissatisfaction and who were further "disgruntled" by statements made to them by Commission representatives. Twenty-seven student witnesses testified on behalf of the Commission. Seven of these, say petitioners, admitted that Commission representatives sought to prejudice them against the company in pre-hearing conferences.

The record does not support this claim. The statements of said seven witnesses as to their interviews with Commission representatives are sketchy and ambiguous.

Some of the seven claim that the agents suggested to them that they, the students, would derive little practical value from the course. Others of the seven flatly denied that any such assertions were made to them. We find no misconduct on the part of the agents, and, further, the credibility of the witnesses was a matter for the hearing examiner and Commission to resolve. Steelco Stainless Steel Inc. v. Federal Trade Commission, (7 Cir. 1951) 187 F.2d 693.

Complaint is made that prejudice resulted from the procedure adopted by the Commission in conducting numerous hearings from place to place throughout petitioners' sales territory. This procedure was adopted to avoid the necessity of transporting all the witnesses from their scattered residences to any one hearing place, a procedure employed to minimize the costs of the proceedings to both parties, which seems entirely reasonable.

Petitioners argue that Joy E. Badley should not have been made a party to the order. He is president of the Oregon corporation and Chairman of the Board of Directors of the Chicago corporation. He owns all but one share of the stock of each. He testified that he alone is responsible for promulgating the advertising and that he supervises the field agents, receiving daily reports on each man in the field. On these facts the Commission was justified in concluding that it was necessary to include Mr. Badley in its order so as to make it fully effective in preventing the practices it found illegal. Federal Trade Commission v. Standard Education Soci-

ety, (1937) 302 U.S. 112; Standard Distribution v. Federal Trade Commission, (2 Cir. 1954) 211 F.2d 7.

It is contended that the findings are not supported by substantial, reliable and probative evidence. The material facts found were: That certain representations as to the benefits to be derived from petitioners' tractor training course and the procedures they employed in teaching the course as made to prospective students were untrue. Facts supporting the finding were deprived from the testimony of twenty-seven student witnesses; from admissions contained in the 1948 stipulation as to the practices at that time; from samples of advertising copy in evidence, and the testimony of eleven expert witnesses, consisting of engineering professors and representatives of the diesel and tractor industries, including persons directly concerned with the hiring and firing of diesel mechanics. The testimony of these last named witnesses was to the effect that graduates of petitioners' tractor training course were not qualified mechanics and were not in demand in the diesel and tractor industries. Cf. Consumers Home Equipment Co. v. Federal Trade Commission, (6 Cir. 1947) 164 F.2d 972; and Hill Bros. v. Federal Trade Commission, (9 Cir. 1926) 9 F.2d 481.

The Commission's order is said to be vague. We do not think so. It prohibits petitioners from making certain specified misrepresentations. Paragraph Six is specifically pointed out. This paragraph prohibits petitioners from representing "that the earnings of individuals who have completed respondent's course of study are in excess of the average net earnings consistently

made by individuals who have completed such course over substantial periods of time under normal conditions and circumstances." This seems plain enough to us. It does not preclude all future representations by petitioners of the earning experience of their graduates. It does preclude representations that petitioners' graduates earn wages in excess of the average net earnings which they actually receive. In short, the order says no more than that future representations by petitioners must have a basis in fact. The order is clear and definite and within the discretion delegated by Congress to the Commission to prescribe appropriate remedies. See Charles of the Ritz Dist. Corp. v. Federal Trade Commission, (2 Cir. 1944) 143 F.2d 676, 679.

Order affirmed.

(Endorsed:) Opinion. Filed Nov. 7, 1955.
Paul P. O'Brien, Clerk.

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TRACTOR TRAINING SERVICE et al.,	)	
Petitioners,	)	
v.	)	No. 14346.
FEDERAL TRADE COMMISSION,	)	
Respondent.	)	

FINAL DECREE AFFIRMING AND ENFORCING ORDER TO CEASE AND DESIST

Tractor Training Service, an Oregon corporation, Tractor Training Service, Inc., an Illinois corporation, and Joy E. Badley, petitioners herein, having filed in this Court on May 5, 1954, a petition to review and set aside an order to cease and desist issued against them on March 3, 1954, by the Federal Trade Commission, respondent herein, in a proceeding before it entitled "In the Matter of Tractor Training Service * * * [and others], Docket No. 5943"; and a copy of said petition having been served upon respondent; and respondent having thereafter certified and filed herein, as required by the Federal Trade Commission Act, a transcript of the entire record in said proceeding; and the matter having been heard by the Court on briefs and oral argument on October 18, 1955; and this Court having thereafter fully considered the cause and having rendered its decision on November 7, 1955, affirming said order:

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the aforesaid peti-